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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1079.

EVELYN WILLIAMS HAY,

Petitioner,

v.

FRANK F. TRUSCOTT, DWIGHT L. MORRIS and OTIS W. ERISMAN, Trustees of the Estate of HARRY D. HOLLOWAY, Deceased,

Respondents.

EVELYN WILLIAMS HAY,

Petitioner,

v.

SALOME HOLLOWAY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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CITATIONS

Cases:

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U. S. 308 (1968)

Apex Smelting Co. v. Burns, 230 U. S. 60 (1913)

Appeal of Allegheny County Airport Authority, 411 Pa. 281, 191 A. 2d 851 (1963)

Appeal of Middleton Township, 419 Pa. 583, 215 A. 2d 687 (1965)

Bailey v. Anderson, 326 U. S. 203 (1945)

Beal v. Washington, 356 U. S. 544 (1958)

Bowe v. Scott, 233 U. S. 658 (1914)

Brown et al. Appellants, v. Glenside Lumber & Coal Co., 422 Pa. 481, 220 A. 2d 822 (1966)

Capital City Dairy Co. v. Ohio, 183 U. S. 238 (1901)

Cardinale v. Louisiana, 394 U. S. 437 (1969)

Central Union Co. v. Edwardsville, 269 U. S. 190 (1925)

Cockburn Co. v. Estopinal, 251 U. S. 170 (1919)

Harding v. Illinois, 196 U. S. 78 (1904)

Herndon v. Georgia, 295 U. S. 441 (1935)

Hissel v. McClintock, 257 U. S. 611 (1915)

Hudson v. Chicago, 202 U. S. 275 (1906)

Irving Trust Co. v. Day, 314 U. S. 556 (1942)

Labrite v. Vincent, 401 U. S. 532 (1971)

Mager v. Grima, 8 How. 490 (1850)

Michel v. Louisiana, 350 U. S. 91 (1955)

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291 (1902)

Parker v. Illinois, 333 U. S. 571 (1947)

Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447 (1935)

U. S. v. Burnison, 339 U. S. 87 (1950)

Williams v. Georgia, 349 U. S. 375 (1954)

Yeadon Wood Civic Association, Appellant, v. Lower Merion Township Board of Adjustment, 406 Pa. 413, 179 A. 2d 49 (1962)

Statutes:

62 Stat. 929, 28 U. S. C. Section 1257

Pennsylvania Wills Act of 1947, 20 P. S. Section 180.14(a)

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

This information is adequately set forth in the Petition with the exception that Petitioner erroneously cites a case, 50 D. & C. 2d 478, which is not here involved. This case is also erroneously included in the Petitioner's Appendix at A21.

JURISDICTION.

Respondents contend that this Court lacks jurisdiction because of Petitioner's failure to raise the alleged constitutional question properly in the Courts of the Commonwealth of Pennsylvania. This contention will be fully discussed in the Statement and the Argument, *infra*.

QUESTIONS PRESENTED.

(a) Whether this Court lacks jurisdiction because Petitioner failed to raise the alleged constitutional question properly in the Courts of the Commonwealth of Pennsylvania.

(b) Whether the Courts of the Commonwealth of Pennsylvania have violated any constitutional rights of the Petitioner where, in interpreting the trust instrument and the will of a third person under the applicable Pennsylvania statutes and case law, they excluded Petitioner from a class gift to children of the testator-settlor's son where Petitioner had been adopted by testator-settlor's son over twenty-nine years after the death of the testator-settlor, when Petitioner was sixty-six years of age and he was seventy-eight years of age and bedridden with cancer from which he died less than one month later.

STATUTES INVOLVED.

The statutes involved and the Amendment of the United States Constitution which Petitioner alleges is involved are set forth in the Petition at page 2.

STATEMENT

In 1935, Harry D. Holloway created an irrevocable Deed of Trust for the benefit of his son, William Evans Holloway. Harry D. Holloway died in 1939 leaving a will which also created a trust for his son. Both trusts provided that upon the death of William Evans Holloway the remainder would pass to his children, with gifts over in default of issue. On November 4, 1968, Williams Evans Holloway, son of testator-settlor, and his wife adopted Evelyn Williams Hay (R. 30a-31a). At that time William Evans Holloway was seventy-eight years of age (R. 22a). He knew at that time that he had terminal cancer of the liver (R. 56a) which prevented his appearance in Court (R. 30a) and from which he died less than one month later (R. 55a, 56a). Evelyn Williams Hay, the adopted "child" and Petitioner herein, was sixty-six years of age, was married, elected not to change her name (R. 22a, 23a) and was the mother of two children (R. 54a). William Evans Holloway, testator's son, died December 3, 1968 (R. 35a, 55a) survived by no other natural or adopted issue.

Evelyn Williams Hay claimed the remainder as the child of William Evans Holloway. The Pennsylvania Courts held that under Pennsylvania statutes and case law she was not entitled to take as a child under the will or deed of a third person, who died over twenty-nine years before the adoption took place. The Pennsylvania Courts awarded the remainder of the testamentary trust to the Trustees of the Residuary Trust under the Will of Harry D. Holloway and the remainder of the Inter Vivos Deed of Trust to Salome Holloway. It is to be noted that Petitioner has named as Respondent, Provident National Bank (formerly Land Title Bank and Trust Company), Substituted Trustee. The Trustee is merely a stakeholder and has no interest in this litigation. The proper Respondent in the Inter Vivos

Deed of Trust is Salome Holloway for whom an appearance has been entered in this Court.

The opinions of the Auditing Judge of the Orphans' Court Division of the Court of Common Pleas of Philadelphia County set forth in Petitioner's Appendix (A1-A15) contain no reference to any constitutional question nor do the opinions of the Orphans' Court Division en banc (Petitioner's Appendix A16-A20), confirming absolutely the Auditing Judge's adjudications. In fact, the record in the lower court is bare of any mention of any constitutional question by Petitioner or her counsel.

The Supreme Court of Pennsylvania by order dated October 13, 1971 merely affirmed, without opinion, the decrees of the lower court, *per curiam* (Petitioner's Appendix A22). Likewise, without opinion, the Supreme Court of Pennsylvania denied by a *per curiam* order entered on November 22, 1971 the Petition for Reargument (Petitioner's Appendix A23).

ARGUMENT.

I.

This Court Lacks Jurisdiction Because of Petitioner's Failure to Raise the Alleged Constitutional Question Properly in the Courts of the Commonwealth of Pennsylvania.

Sub-section 3 of 62 Stat. 929, 28 U. S. C. Section 1257 requires that the "alleged constitutional issue" must be "drawn in question." The proper method of raising the constitutional question is dependent upon the particular state practice, at least as long as the litigant has a reasonable opportunity to have such an issue heard and determined. *See Central Union Co. v. Edwardsville*, 269 U. S. 190, 194-5 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U. S. 447, 462-3 (1935); *Parker v. Illinois*, 333 U. S. 571, 574-5 (1947); *Michel v. Louisiana*, 350 U. S. 91, 93 (1955). The constitutional question must be raised at the proper point in the state court proceeding. *Gobelman Co. v. Estoppial*, 251 U. S. 179, 181 (1919); *Beck v. Washington*, 369 U. S. 541, 550 (1962). The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. *See Cardinale v. Louisiana*, 394 U. S. 437, 439 (1969); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U. S. 308, 334 (dissent) (1968). "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U. S. 375, 382-3 (1954). *See Hulbert v. Chicago*, 202 U. S. 275 (1905) where there was, as here, complete failure to raise the federal constitutional question at the trial court level.

This Court will decline to exercise jurisdiction where the highest state court is completely silent on the federal question assuming, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U. S. 203, 206-7 (1945); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 309-(1902).

The law of Pennsylvania is clear that a question not raised properly in the court below will not be considered by the Supreme Court of Pennsylvania on appeal and this rule applies even though the question sought to be raised involves a constitutional issue. *Wynnewood Civic Association, Appellant v. Lower Merion Township Board of Adjustment*, 406 Pa. 413, 419, 179 A. 2d 649, 652 (1962); *Amalgamated Transit Union, Division 85 v. Port Authority of Allegheny County, Appellant*, 417 Pa. 299, 307; 208 A. 2d 271, 275 (1965); *Brown et al., Appellant v. Glenside Lumber & Coal Co.*, 429 Pa. 601, 603; 240 A. 2d 822, 825 (1968); *Archbishop O'Hara's Appeal*, 389 Pa. 35, 46-47; 131 A. 2d 587, 593-593 (1957).

Rule 23, Section 1(f). of the United States Supreme Court rules provides as follows:

> "1. The petition for writ of certiorari shall contain in the order here indicated— * * * *
>
> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary

> thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioner's unsuccessful attempt to meet the above requirements is limited to the following at page 5 of her Petition:

> "It was the petitioner's position in the lower Court and on appeal that the Pennsylvania rule of law with respect to inheritance rights of adopted children, should be abandoned because it is founded upon error and is inconsistent with public policy and social requirements. The Constitutional question raised by this petition was raised before the Supreme Court of Pennsylvania."

Petitioner's vagueness is understandable because of her complete failure to meet the requirements of Pennsylvania state practice that a federal constitutional question must be raised in the trial court. The Petition is fatally defective on its face because, in effect, Petitioner has conceded that the constitutional question was not raised until the case was before the Supreme Court of Pennsylvania. Certainly, arguments which may have been made by the Petitioner in the court below of any alleged inconsistency with "public policy" and "social requirements" do not involve federal constitutional questions.

Indeed, Petitioner's assertion that the alleged constitutional question was raised even before the Supreme Court of Pennsylvania is questionable. Petitioner's coverage of

the alleged constitutional question in the Supreme Court of Pennsylvania is limited to two sentences in a twenty page printed brief, these sentences being quoted in paragraph 3 of Petitioner's Reply to Answer to Petition for Reargument filed with the Supreme Court of Pennsylvania, as follows:

> "An adoption decree terminates the natural parent-child relationship, and engrafts the adopted child onto the family tree of the new parentage. As such, the child attains the status, in law, of a natural child. Cf., Schwab Adoption Case, 355 Pa. 534, 536, 50 A. 2d 504, 505 (1947). To (sic) certainly appear to be a deprivation of both equal rights as well as due process under the Constitution of the United States."

In raising the federal constitutional question below care must be taken to make reference to the particular clause of the federal constitution relied upon and this Court has held that reference to "due process of law" without further delineation does not sufficiently frame the federal question. *Bowe v. Scott*, 233 U. S. 655, 664-5 (1913). See also *Herndon v. Georgia*, 295 U. S. 441, 442-3 (1935); *Harding v. Illinois*, 196 U. S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248 (1901).

II.

There Is No Constitutional Question Involved.

The Petition states that "petitioner finds herself on no family tree." (page 6). This is not correct. Even though she was sixty-six years old when she was adopted by this dying man, she was engrafted onto the family tree of her adopting parents. Her real complaint is that the Pennsylvania statutes prevented her from using this device

to inherit under a will and deed of trust of a third person who died over twenty-nine years before the adoption.

The transmission of property by will or intestacy is regulated and limited by state law as enacted by the state legislature and interpreted by the state courts. *Labrine v. Vincent*, 401 U. S. 532 (1971),[1] denying an illegimate the right to inherit; see also *U. S. v. Burnison*, 339 U. S. 87 (1950) denying the United States the right to a testamentary gift; *Irving Trust Co. v. Day*, 314 U. S. 556 (1942), sustaining the right of a widow to take against her husband's will; *Hood v. McGehee*, 237 U. S. 611 (1915), denying children adopted outside the state the right to inherit; *Mager v. Grima*, 8 How 490 (1850), sustaining tax on a testamentary gift to an alien. "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U. S. at 562.

Even assuming arguendo that this court may at some time desire to review the rights of adopted children under the federal Constitution, we respectfully submit that this case with its bizarre facts does not lend itself to such a review. The Pennsylvania Joint State Government Commission, drafters of the Wills Act of 1947, makes, *inter alia*, the following comment to Section 14(6) of the Wills Act of 1947, 20 P. S. Section 180.14(6); "In requiring adoptions to be made before the testator's death, it avoids the possibility of adoptions for the sole purpose of preventing a gift over in default of issue." It is submitted that in the case at bar the deathbed adoption of the Petitioner, a sixty-six year old "child", was for the sole purpose of changing the devolution of property.

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1. Rehearing denied 402 U. S. 990.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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EDWARD M. DAVID,
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Of Counsel:
SAUL, EWING, REMICK AND SAUL.

March 14, 1972.

CERTIFICATE OF SERVICE.

I hereby certify that on this 14th day of March, 1972 five copies of the Brief for Respondents in Opposition were delivered to S. Regen Ginsburg, Esq., Suite 1403, Land Title Building, Philadelphia, Pennsylvania, 19110, Attorney for Petitioner. I further certify that all parties required to be served have been served.

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